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Liability for Stress-related Injury

Guest Lecture delivered at
University of Salford

By

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Middlesex University

Objectives are to -

- Define stress
- Note incidence of work-related stress
- Review the development of liability for psychiatric injury
- Consider particular factors relevant to negligence
- Trace the development of employer's liability
- Note alternative claims

What is Stress?

- “We define work-related stress as ‘the adverse reaction people have to excessive pressures or other types of demand placed on them’.”
- *Tackling work-related stress – A manager’s guide to improving and maintain employee health and well-being.* HSE 2001

What are the adverse effects?

- Anxiety
- Ill-health
 - Psychiatric Injury e.g. depression
 - Physical injury e.g. high blood pressure, heart disease, ulcers, thyroid disorders. R.S.I.? (see *Mughal v Reuters* [1993])

Mental health and physical well being linked

- Stress and depression are just as likely to cause a heart attack as being fat or having high cholesterol – Harvard Medical School

The Times, 28th September 2005

Incidence of work-related stress

- <http://www.hse.gov.uk/stress>
 - about half a million people in the UK experience work-related stress at a level they believe is making them ill;
 - up to 5 million people in the UK feel "very" or "extremely" stressed by their work; and
 - a total of 12.8 million working days were lost to stress, depression and anxiety in 2003/4

How accurate are these figures?

- They represent work people's self-diagnosis;
- One person's stress is another person's challenge
- *Both civil litigation and focus of HSE clearly indicate it is now considered unacceptable for work to cause stress*

For what is a defendant liable?

- Criminally, under the Health and Safety at Work Act 1974
 - Creating the risk of personal injury
- Civilly
 - In negligence having caused personal injury
 - For breach of contract?
 - Under the Protection from Harassment Act 1997 causing anxiety

When suing in tort of negligence

- Claimant must prove:
 - D owed C a duty of care
 - D broke that duty by negligent conduct
 - D's breach caused
 - Damage to C
- *Most personal injury claims brought in negligence*

Origins of liability for psychiatric injury

- Nervous Shock following traumatic event
 - Initially evidenced in physical form typically miscarriage See *Dulieu v White* [1901]
 - Later PTSD etc See *McLoughlin v O'Brian* [1983]
 - Liability for psychiatric illness refined in *Alcock v CC of S. Yorks Police* [1991] and *Page v Smith* [1996]

Nervous Shock Continued

- Claimant must either
 - Have ties of love and affection with the victim
etc
or
 - Be personally at risk of physical injury
- Not exclusively employer's liability (many transport cases)

Distinguish

- Illness caused by single traumatic event from
- Illness caused by on going stressful circumstances
- Employer's liability today typically for the latter

Walker v Northumberland CC [1995]

- First clear case of employer's liability for stress
- Duty of care accepted
- Conscientious employee: heavy work load
- Employer liable for foreseeable 2nd illness
- Employer's limited resources no defence

Colman J in QBD

- I therefore consider that before the 1986 illness it was not reasonably foreseeable to the Council that the workload to which Mr W was exposed gave rise to a material risk of mental illness ...
- I have no doubt that it ought to have been foreseen .. That if Mr W was again exposed to the same workload ... there was a risk that he would again succumb to mental illness and that such illness would be likely to end his career ...

Subsequent developments in negligence litigation

- From 1995 many claims filed
- A number of employees succeeded in County Courts
- Then employers appealed to Court of Appeal – a group of appeals heard together – in *Hatton v Sutherland*

Appeals to Court of Appeal

- *Hatton v. Sutherland*
Employer won appeal – teacher divorce etc
- *Barber v. Somerset County Council*
Employer won appeal – teacher school re-structuring
- *Jones v. Sandwell MBC*
cc decision upheld – 2 jobs rolled together
- *Bishop v. Baker Refractories Ltd*
Employer won appeal – inflexible employee

Hale LJ's 16 propositions

- Duty of care confirmed (1)
- Threshold – foreseeability (2)
- Foreseeability depends on what e'r knows
 - demands of jobs
 - signs from worker (5)
- E'r failed to take reasonable steps (8)
 - size of organisation (9)
 - would action help? (10)
 - has e'r advisory service? (11)
 - e'r does not have to dismiss (12)

Hale's propositions cont.d

- Breach caused illness (14)
- Damage may be apportioned (15)
- Pre-existing disorders to be taken into account (16)

Controversial propositions

- Size of organisation material –
See *Walker v Northumberland*
- Rely on what employee says –
See *Young v Post Office*
- No duty to dismiss
See *Coxall v Goodyear*

Foreseeability – other factors

- Case law – NB *Hartman v South Essex Mental Health and Community Care NHS Trust* – vulnerability of long service e'ee
- Published reports e.g. *Self-reported work-related illness in 2003/04* – vulnerability of 50 year olds
- HSE *Management Standards*

HSE *Management Standardss*

- Risk assessment for stress required under reg 3 of Management of Health & Safety at Work Regulations
- Guidelines identify stress factors:
 - DEMANDS – workload
 - CONTROL – of work by e'ee
 - SUPPORT – by e'r
 - RELATIONSHIPS – harmony at work
 - ROLE – clear to e'ee
- - CHANGE – how handled

HSE role cont'd

- E'r should consult with ee's to get to know
Have way to help the vulnerable
- Compliance would reduce likelihood of civil liability
- Failure to comply
 - evidence against e'r
 - possibly independent action for breach of statutory duty

Causation of stress per Hale LJ

- Claimant must show e'rs breach of duty caused or materially contributed to the "harm"
- [The "harm" must be recognised form of ill-health]
- Claimant in difficulties if cause is "vulnerability" of which e'r unaware
- Sufficient e'rs negligent a "material contribution"
Bonnington Castings Ltd v Wardlaw [1956]
- Apportionment if more than one cause

Are Hale's propositions correct

- *Barber v. Somerset County Council* was appealed
 - HL restored CC judgment BUT
 - The propositions were tacitly accepted by all AND
 - Expressly approved by Lord Scott BUT
 - Lord Walker emphasised each case depended on its facts

Subsequent cases:

- *Hartman v South Essex Mental Health and Community Care NHS Trust* [2005]
 - 6 appeals to CA
 - In 5 the issue was foreseeability
 - All 50+, long service, vulnerable
 - 4 employers provided counselling
 - 3 cases decided in favour of employer

Breakdown of *Hartman*

- *Hartman*
 - foreseeable: (1) Application form; (2) client's accident; (3) complaints of overwork
- *Best v Staffordshire University*
 - not foreseeable, e'r not on notice of problem
- *Wheeldon v HSBC Bank Ltd*
 - E'r on notice and failed to discuss situation

Hartman Cont.d

- *Green v Grimsby & Scunthorpe Newspapers Ltd*
 - Employee complained but in circumstances breakdown not foreseeable
- *Moore v Welwyn Components Ltd*
 - 25 years service, depression at age 55 partly due to disposition but as bullying e'r 100% liable
- *Melville v The Home Office*
 - Prison officer ill after prisoner suicide. Foreseeable though part of the job

Evidential problems for claimant

- Proving employer was negligent
 - Establishing foreseeable
 - Knew claimant's susceptibility
 - Showing situation "avoidable"
- Proving ill-health caused by the negligence
 - Was the claimant vulnerable by temperament or personal circumstances?

Establishing Liability by another route?

- Contract
 - Wrongful termination?
 - Breach of contract
- Unfair dismissal
- Unlawful discrimination
- Harassment

Contract in common law courts

- Breach of duty of trust and confidence
[*Malik v BCCI*]
 - No help where wrongful termination
Johnson v Unisys [2001] confirmed *Addis v Gramophone Co* [1909] only economic loss
 - Duty may be relevant if contract not terminated *Gogay v Herts CC* [2002] (HC)
cf *Eastwood v Magnox* (etc) [2004] (HL)

Claiming in Employment Tribunal

- Unfair dismissal
Dunnachie v Kingston [2004] confirmed ET only empowered to compensate for economic loss + statutory cap
- Discrimination – a statutory tort – compensation for personal injury may be possible where harassment: see *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999]

Protection from Harassment Act

- ***Majrowski v Guy's and St Thomas's NHS Trust* [2005]**
 - Claim against e'r for e'ee's breach of statutory duty in employment
 - Claimant need not be employee
 - Covers anxiety
 - Harassment need not be foreseeable
 - Relates to course of conduct
 - Just and reasonable to impose employer's liability

Conclusions

- Claims for negligence may decline:
 - *Hatton* increases burden of proof
 - Employers may respond to HSE and assess
 - Alternative claims
- Population may learn from Government campaigns for healthy living